In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 644

OTTO W. HEIDER, SR., AND IRENE E. LAWRENCE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 347 F. 2d 695 (Pet. A1–A3), and the opinion of the district court is reported at 231 F. Supp. 223 (Pet. A4–A29).

JURISDICTION

The judgment of the court of appeals was entered June 15, 1965 (Pet. A30). A timely motion for rehearing was denied August 5, 1965 (Pet. A31). On September 4, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to October 4, 1965, and the petition was filed on that

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date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge in petitioners' tax-evasion prosecution predetermined the issue of intent.

2. Whether the court erroneously shifted the burden of proof to petitioners.

3. Whether the trial court's findings of fact were supported by the evidence.

STATEMENT

On February 16, 1961, petitioners, a former attorney and his secretary, were indicted in the United States District Court for the District of Oregon for willfully attempting to defeat and evade the former's 1953 and 1954 income taxes totalling $272,898.42 (1 V. 1).[1] Petitioners waived a jury (1 V. 23, 24), and were tried and convicted on both counts by the court. Heider was sentenced concurrently on each count to two and one-half years imprisonment and given a $10,000 fine on count two. Miss Lawrence was given concurrent sentences of sixty days' imprisonment on each count (1 V. 91, 92).

Heider's tax returns reported a net loss of $92,937.05 in 1953 and zero taxable income in 1954 (due to a loss carry-forward from 1953). The govern-

[1] "1 V. 1" refers to Volume 1, page 1, of the 14-volume record filed in this Court.

ment's net worth computations were the basis of the following unreported taxable income figures:

	Per indictment	Per Government computations	Per court's findings
1952 [1]		$442,666 (2 V. 27)	
1953	$203,425	$5,999 (2 V. 27)[2]	$1,653 (Pet. A28).
1954	196,829	307,046 (2 V. 293)	$91,070 (Pet. A28).

[1] The year 1952, for which Heider reported a loss (2 V. 23, 143), was barred by the statute of limitations, but the government proved corrected income for that year in order to show wilful intent, to preclude loss carry-over adjustments, and to provide continuity of net worth proof from the starting point of December 31, 1951 (8 V. 884).

[2] The large downward revisions in unreported income were attributable in part to disclosure by petitioner's counsel, during pretrial conferences in 1962, of additional contract assets totaling $268,000 as of December 31, 1952 (5 V. 363). In 1956, Heider had assured the investigating agent that the latter had been furnished all contract records (5 V. 367).

Petitioner Heider practiced law until 1959 (Pet. A4), but his primary business (12 V. 1393) was making loans secured by realty and by trucks, tractors and heavy equipment. Additional income was received from rental properties and from a garage operated chiefly to repair repossessed vehicles (Pet. A4–A5). In 1953, he paid some $300,000 in tax deficiencies, penalties and interest (Pet. A5) based on net worth computations covering tax years 1939 through 1951 (4 V. 31).

Although Heider had an accountant install new books during 1952 (4 V. 86) and 1953 (4 V. 129), a new investigation, commenced in 1956 as to tax years 1952, 1953 and 1954 (5 V. 332), disclosed inadequate records covering loan contracts, repossessed equipment, equipment purchases and sales, segregation of income from repayment of principal, and down payments

from customers (7 V. 572, 574, 605–618). Heider appropriated $13,495.72 during 1952–1954 from checks written in excess of loans actually advanced to borrowers (8 V. 819). Specific items of unreported vehicle income during 1953 and 1954 totalling $87,449.55 were established (9 V. 1022), as well as unreported income from garage repair sales totalling $11,069.34 (9 V. 1032). Although he had told the revenue agent that all receipts were deposited (6 V. 545), Heider testified at trial (12 V. 1285) that he had actually accumulated a cash hoard of some $67,000 by January 1, 1953, out of receipts from his business. He testified these funds accounted for certain bank deposits in 1954 which had theretofore (6 V. 545) been attributed on his books to loans from various friends and relatives. At trial these individuals denied making such loans (5 V. 312 *et seq.*).

Miss Lawrence made entries recording these false loans (11 V. 1184), and had the bookkeeper record one fictitious $9,000 promissory note from Heider to Miss Lawrence (4 V. 230). Miss Lawrence also maintained a vehicle contract record (4 V. 200) which omitted contracts totalling $202,784.77 during 1953 and 1954 (Ex. 87, 10 V. 1182), and she prepared repossession lists (1 V. 210) which falsely inflated losses (9 V. 1033). The tax returns were prepared by an accountant from records maintained and supplied by Miss Lawrence (4 V. 133–171).

ARGUMENT

Petitioners make generalized contentions (1) that the trial court "prejudged" Heider's intent to evade

taxes, (2) that the burden of proof was shifted to petitioners, and (3) that the government's net worth proof was insufficient (Pet. 4–6). These arguments are unsupported by the record.

1. The trial court not only did not "prejudge" petitioner Heider's intent, but, on the contrary, initially expressed skepticism that a man, whatever his business ethics, would attempt to evade taxes while the "government is breathing down his neck" (4 V. 16). As the pattern of intent gradually emerged from the evidence, the court acknowledged that its impressions were veering toward a contrary finding (7 V. 672; 12 V. 1390), but repeatedly stated that it would be receptive to defense evidence of mistake and good faith (4 V. 23, 297; 5 V. 405; 7 V. 723; 9 V. 964; 10 V. 1098; 11 V. 1212, 1214; 12 V. 1278). Heider's own testimony, however, was limited to establishing a cash hoard, and the court's opinion correctly noted that with respect to "intent * * * to cheat the Government * * * Heider did not seriously deny such intent, nor has he argued that issue" (Pet. A7).

2. The petition does not specify how or when the trial court shifted the burden of proof to petitioners, and there is no support for the charge in the record. In the court below, petitioners based this claim on the trial court's inquiry (14 V. 1596) whether the government's burden of proving the tax due was aided by the civil rule that the taxpayer must show the assessment erroneous. But the record demonstrates that the court accepted defense counsel's argument and held that the burden regarding this element was on the government (8 V. 887; 14 V. 1599, 1604).

3. Petitioner's claim that the court failed to make net worth findings is without merit. The elements of the offense charged, recently restated in *Sansone* v. *United States*, 380 U.S. 343, 351, were all found specifically by the trial court, *i.e.*, (1) wilful intent; (2) the affirmative act of filing and causing to be filed a false return; and, (3) an additional tax due. Although special findings were not requested (see Federal Rules of Criminal Procedure 23(c)), the trial court made voluminous findings (Pet. A4–A29) on contested items argued in written briefs (2 V. 1–322). The court's attention to the details is reflected in its findings (Pet. A28) reducing the government's computation (2 V. 27) of the amount of tax evaded.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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